U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: August 23, 2000

CASE NO: 1999-INA-309

In the Matter of

STEPHANY DERRY
Employer

on behalf of

LUIS ANTONIO HERRERA
Alien

Appearances: Marie I. Soler, Esq.
For Employer and Alien

Certifying Officer: Richard E. Panati, Region III

Before: Burke, Huddleston, and Jarvis
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER FOLLOWING REMAND

This case arises from Stephany Derry's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has

determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On June 24, 1996, the Employer filed a Form ETA 750 Application for Alien Employment Certification on behalf of the Alien, Luis Herrera. (OAF 15-16[1]). The job opportunity was listed as "Cook (305.281-010)". (OAF 15). The job duties were described as follows:

> Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and bakes breads and deserts. Boils, broils, fries, and roasts meats, poultry, seafood and pastas. Prepares sauces, soups, and salads. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. Serves meals.

(Id.). The stated job requirements for the position, as set forth on the application, are the completion of grade school and two years experience in the job offered. (Id.).

On April 7, 1999, this matter was remanded under 1999-INA-080 for the purpose of allowing the CO to issue a supplemental NOF for reevaluation of the application consistent with the *en banc* decisions in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*) and *Elain Bunzel*, 1997-INA-481 (Mar. 3, 1999) (*en banc*). (AF 28-30).

The CO issued a second Notice of Findings ("NOF") on May 17, 1999, consistent with the guidelines established in the case of *Carlos Uy III*. (AF 25-27). The CO found that the job opportunity must be clearly open to U.S. workers, citing section 656.20(c)(8). The CO noted that the application contained insufficient information to determine whether the position of Domestic Cook actually exists in Employer's household or whether the job was created solely for the purpose of qualifying the alien as a skilled worker under current immigration law. The CO set forth a series of twelve questions designed to establish whether the position was *bona fide*, or was created solely

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1 This case was remanded on April 7, 1999. The original Appellate File was not incorporated into the page numbering system of the new Appellate File and therefore it will be referred to as the Original Appellate File ("OAF").

for the Alien to fit her within a skilled worker category for immigration purposes. The CO very explicitly stated that merely answering the questions would not be sufficient to rebut the NOF; documentation was important and all responses and documentation would be evaluated. (AF 23-24).

The Employer submitted her rebuttal to the NOF on August 5, 1999, in the form of a letter from Employer's attorney, a letter written and signed by Employer, a list with seven dates that Employer has entertained, and Employer's 1998 Federal Tax Return. (AF 5-24). Employer provided a daily schedule for the Alien and asserted that twenty-two hours a week were devoted to meal preparation. (AF 7). Employer stated that the Alien's primary duties are:

> planning the menus, researching the cook books, making the shopping list, grocery shopping, preparing the meals, cooking and baking, setting the table, cleaning dishes and utensils, and cleaning the kitchen and dining room. Other functions that he performs include vacuuming and dusting the house, cleaning the windows and small household repairs as needed.

(AF 8). Employer explained that she does not entertain frequently and has entertained seven times in the twelve months preceding the filing of the labor certification application. Employer asserted that she would be out of the home from 7:30 a.m. until 6:00 p.m., her five year-old child is away at school from 8:30 a.m. until 12:30 p.m., and her twelve year-old child is away at school from 8:30 a.m. until 3:00 p.m. The tax returns were provided to document the ability to pay the salary of the cook. (15-24). Employer also asserted that she employs a personal assistant 55 hours a week, whose primary duties are to care for the children. (AF 9). Finally, Employer stated that she employed a domestic cook from January 1992 to March 1993 and from September 1996 to June 1997 and that there is no special relationship between Alien and Employer. (AF 9-10).

The CO issued a Final Determination ("FD") on August 11, 1999, denying certification. (AF 4-5). The CO found that Employer failed to establish that there is a bona fide position for a Domestic Cook in Employer's household, in violation of 20 C.F.R. § 656.20(c)(8). (AF 4). The CO found that the rebuttal evidence shows that:

> the alien will be employed as a General Houseworker rather than a Domestic Cook. Your rebuttal evidence does not show that you entertain frequently or that the alien will be involved on a full-time basis preparing meals for family members to consume. Most family members are outside the home working or attending school for the greater part of the alien's daily work schedule.

(Id.). For these reasons, the CO found that while the alien may cook some meals, it is "implausible that the alien will be engaged as a full-time Domestic Cook because there is no one at home to eat most of the meals that the alien supposedly will prepare and serve." (Id.). In addition, the CO noted that the rebuttal indicates that the Alien is "responsible for cleaning and vacuuming the house and making small household repairs." (Id). The CO found that these are the duties of a General Houseworker, not a Domestic Cook.

The Employer filed a Request for Review on September 13, 1999. (AF 1-2). The file was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA") for review. The Employer then filed a Statement of Position on October 28, 1999.

Discussion

In *Carlos Uy, III, 1997-INA-304* (Mar. 3, 1999) (*en banc*), the Board held that a CO may properly invoke the *bona fide* job opportunity analysis authorized by 20 C.F.R. 656.20(c)(8) if the CO suspects that the application misrepresents the position offered as skilled rather than unskilled labor in order to avoid the numerical limitation on visas for unskilled labor. When the CO invokes section 656.20(c)(8), however, administrative due process mandates that he or she specify precisely why the application does not appear to state a bona fide job opportunity. It is the employer's burden following the issuance of an NOF to perfect a record that is sufficient to establish that a certification be granted. The Board in *Uy* rejected the employer's contention that where a CO does not request a specific type of document, an undocumented assertion must be accepted and certification granted.

In this case, the CO requested responses to several inquiries concerning whether the position of Domestic Cook actually exists in Employer's household and requested documentation to support these responses. The Employer responded with undocumented assertions about the number of meals prepared and the schedule and duties of the Alien. The Employer asserted that childcare was provided by Employer's personal assistant but no evidence of this employee was submitted. Employer also asserted that she has employed a Domestic Cook in the past but again provided no documentation to support this assertion. In addition, the Employer provided no documentation as to who would be performing the general cleaning in the household and admitted that the Alien would be performing such duties as vacuuming, dusting, cleaning windows and small household repairs. (AF 8). Under the totality of circumstances test set out in *Uy*, *supra*, the CO properly denied labor certification. Where the CO requests a document or information which has a direct bearing on the resolution of the issue and is obtainable by reasonable effort, the employer must produce it. *See Gencorp*, 1987-INA-659 (Jan. 13, 1989) (*en banc*). Employer's bare assertions are insufficient to carry the Employer's burden of proof required to sustain alien labor certification. *See Jane B. Horn*, 1994-INA-6 (Nov. 30, 1994); *Dr. Daryao S. Khatri*, 1994-INA-16 (Mar. 31, 1995).

Accordingly, we find the CO's denial of certification was proper.

Order

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California